(1)

91-808

No.

In The
Supreme Court of the United States
October Term, 1991

RITAELLEN M. MURPHY, R.N., et al.,

Petitioners,

vs.

RICHARD M. RAGSDALE, M.D., et al.,

Respondents.

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Whether class members have standing to object to a settlement proposal which through an illegal and unconstitutional process guts their interests and undermines the express legislative motives of the State?

2) Whether federal courts should redefine legislative intent in areas of health safety and cost containment where the statutes in question touch on the subject of abortion?

3) Whether the actions of federal courts should be restricted by federalism.

5) Whether a State may establish personhood for unborn children so that an unborn child may through a guardian protect her own rights and interests?

6) Whether *Roe v. Wade* should be reconsidered?

PARTIES TO THE PROCEEDINGS

Petitioners-Plaintiffs-Appellants:

Ritaellen M. Murphy, who has a Bachelors of Science in Nursing, is a practicing Registered Nurse, a Critical Care Registered Nurse, a Trauma Nurse Specialist, an advanced Cardiac Life Support Instructor, a consultant to the American Heart Association, a member of the Advanced Cardiac Life Support-Target Action Group Committee, a Pediatric Advanced Life Support Instructor, a Cardiac Pulmonary Resuscitation affiliate facility member, and the Director of Life Support Services (a division of the Emergency Medical Services Department) at Loyola University Medical Center, which is a Level II Trauma Center in Maywood, Illinois. She is certified in Mobile Intensive Care Nursing. She has personally witnessed the medical and psychological complications, including suicidal ideations, which can and do result from legal abortions. She is a member of the plaintiff class of Illinois women of child-bearing age who desire or may desire an abortion sometime in the future.

Penny R. Greenwood, who has a Bachelors of Science in Psychology, is a practicing Clinical III Registered Nurse, a Clinical III Trauma Nurse Specialist, former Department Head of Out-Patient Surgery, and a member of the emergency room medical staff at Hinsdale Hospital in Hinsdale, Illinois. She is certified in Advanced Cardiac Life Support, in Cardiopulmonary Resuscitation and in Mobile Intensive Care Nursing. She is experienced in hospital obstetrical care. She has personally witnessed the medical and psychological complications, including suicidal ideations, which can and do result from legal abortions. She is a member of the plaintiff class of Illinois women of child-bearing age who desire or may desire an abortion sometime in the future.

Petitioners-Proposed Intervenors-Appellants:

Kenneth M. Reed, as an expectant father, proposed intervention of behalf of his unborn child and on behalf of all other Illinois unborn children. He owns his own construction business based in Clarendon Hills, Illinois.

Mark I. Aughenbaugh, as an expectant father, proposed intervention on behalf of his unborn child and on behalf of all other Illinois unborn children. He is a journeyman carpenter based in Aurora, Illinois.

Respondents-Plaintiffs-Appellees:

Richard M. Ragsdale, M.D., is an experienced abortionist, performing over 3,500 abortions per year. He filed suit on behalf of all physicians and surgeons who perform or desire to perform abortions in the State of Illinois.

Northern Illinois Women's Center is an Illinois corporation performing abortions in Rockford, Illinois.

Margaret Moe is a registered nurse, who is the sole owner and executive director of a medical facility, which desires to perform abortions in Cook County, Illinois.

Sarah Roe and **Jane Doe** are women who have had abortions in the past and may desire abortions in the future. They filed suit on behalf of all women of child-bearing age who desire or may desire an abortion sometime in the future.

Respondents-Defendants-Appellees:

Bernard J. Turnock, M.D., was the Director of the Department of Public Health of the State of Illinois and was sued in his official capacity. He was responsible for the enforce-

ment of the Ambulatory Surgical Treatment Center Act and the promulgation and enforcement of regulations under that Act, and had administrative responsibilities under the Health Facilities Planning Act. **John R. Lumpkin, M.D.**, succeeded him.

Neil F. Hartigan was sued in his official capacity as Attorney General of the State of Illinois. He was charged with the defense of challenges to the Medical Practice Act, the Ambulatory Surgical Treatment Center Act, the Abortion Act and the Health Facilities Planning Act, and their respective regulations, throughout the State of Illinois. In addition, as chief legal officer of the State of Illinois, the Attorney General represented the directors of state agencies in their enforcement activities, and upon referral by these agencies, has certain enforcement responsibilities on behalf of these agencies. He was replaced in office by **Roland Burris**.

Richard M. Daley was the State's Attorney of Cook County and was sued in his official capacity, and as representative of the defendant class of all state's attorneys of the one hundred and one other counties of the State of Illinois. He was succeeded in office first by **Cecil Partee** and then by **Jack O'Malley**, the present Cook County State's Attorney. The state's attorneys are the chief legal officers of the counties and represent the People of the State of Illinois in the enforcement of certain statutes, including the Abortion Act.

Gary L. Clayton was the director of the Department of Registration and Education and was sued in his official capacity. He was ultimately succeeded by **Nikki M. Zollar**, the Director of the successor agency, the Department of Professional Regulation. **Steven F. Selcke, Robert C. Thompson** and **Kevin K. Wright** had served as interim agency directors. All five individuals have been empowered to implement, administer, and enforce the Medical Practice Act.

TABLE OF CONTENTS

88-790 APPENDIX
(Separate Volume)

App. Page

APPENDIX
(Separate Volume)

App. Page

TABLE OF AUTHORITIES

Federal Cases

State Cases

Federal Constitutional Provisions

State Constitutional Provisions

Federal Statutes

State Statutes

State Regulations

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

Turnock v. Ragsdale (88-790)
Original Petition For Certiorari

The Supreme Court of the United States granted certiorari on July 3, 1989 but reserved consideration of the question of jurisdiction until the hearing on the merits.[1] On December 1, 1989 the Court granted the joint motion to defer further proceedings.[2] However, *Turnock v. Ragsdale* is presently pending before the Court and has been carried over to the Court's 1991-92 term.[3]

In its March 10, 1988 divided opinion,[4] as amended by April 13, 1988 order,[5] the Court of Appeals with a strong dissent decided to affirm in substantial part the November 27, 1985 opinion of the District Court.[6] In its August 12, 1988 and August 16, 1988 orders the Court of Appeals denied the Petition for Rehearing and the Suggestion for Rehearing En Banc.[7]

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[1]*Turnock v. Ragsdale*, 109 S.Ct. 3239, 106 L.E.2d 587 (1989).

[2]*Turnock v. Ragsdale*, 110 S.Ct. 532, 107 L.Ed.2d 530 (1989).

[3]*Turnock v. Ragsdale*, 59 U.S.L.W. 3013 (July 17, 1990) and *Turnock v. Ragsdale*, 60 U.S.L.W. 3013 (July 16, 1991). *Turnock v. Ragsdale* (88-790) was the oldest Appellate Docket case carried over to the Court's 1991-92 term.

[4]*Ragsdale v. Turnock*, 841 F.2d 1358 (7th Cir. 1988), is reproduced in 88-790 Appendix A.

[5]The April 13, 1988 order amending the March 10, 1988 opinion and the judgment order of March 10, 1988 are reproduced in 88-790 Appendix C and Appendix B, respectively.

[6]*Ragsdale v. Turnock*, 625 F.Supp. 1212 (N.D.Ill. 1985) is reproduced in 88-790 Appendix G. The class certification and preliminary injunction order entered December 11, 1985 is reproduced in 88-790 Appendix F.

[7]The August 12, 1988 order and the August 16, 1988 amended order denying the Petition for Rehearing and the Suggestion for Rehearing En Banc are reproduced in 88-790 Appendix E and Appendix D, respectively.

Murphy v. Ragsdale **(90-714)**
Petition For Certiorari Before Judgment

On December 3, 1990 the Court denied the Petition for Certiorari before Judgment.[8] The case proceeded to oral arguments before the Court of Appeals on December 4, 1990.

Murphy v. Ragsdale
Present Petition For Certiorari After Judgment

The present Petition for Certiorari is being made after judgment by the Court of Appeals. In its August 20, 1991 divided opinion[9] the Court of Appeals with another strong dissent decided to affirm the March 22, 1990 opinion of the District Court.[10] The August 20, 1990 order, corrected on August 22, 1990 denied the suggestion for hearing en banc.[11]

JURISDICTION

This action was originally brought under 28 U.S.C. Sections 2201 and 2202 and 42 U.S.C. Section 1983 challenging the constitutionality of portions of the Ambulatory Surgical Treatment Center Act, the Medical Practice Act and the Health Facilities Planning Act, and 28 U.S.C. Section 1343 seeking declaratory and injunctive relief in a class action.

The District Court's orders of November 27, 1985 and December 11, 1985 preliminarily enjoined enforcement of portions of the Acts and the rules promulgated thereunder for first

[8]*Murphy v. Ragsdale*, 111 S.Ct. 568, 112 L.Ed.2d 574 (1990).
[9]*Ragsdale v. Turnock*, 941 F.2d 501 (7th Cir. 1991).
[10]*Ragsdale v. Turnock*, 734 F.Supp. 1457 (N.D.Ill. 1990).
[11]The August 22, 1990 corrected order denying the Suggestion for Hearing En Banc is reproduced in Appendix at A-78.

and/or early second trimester abortions or other abortion-related procedures.[12]

With jurisdiction based on 28 U.S.C. Section 1292, the Court of Appeals with a vigorous dissent vacated as moot one portion of the District Court's decision, held unconstitutional the other challenged provisions, and affirmed the remainder of the decision on March 10, 1988.[13] The August 12, 1988 order and the August 16, 1988 amended order denied both the Petition for Rehearing and the Suggestion for Rehearing En Banc.[14]

With jurisdiction based on 28 U.S.C. Section 1254(2), defendants Turnock, Hartigan and Selke filed their Notice of Appeal in the Court of Appeals on November 7, 1988.[15] The Court on July 3, 1989 accepted the case for argument.[16] On December 1, 1989 the Court granted the joint motion of the parties to defer further proceedings.[17] However, *Turnock v. Ragsdale* (88-790) has been carried over to the Courts 1991-92 docket.[18]

The settlement proposal considered by the District Court would permanently enjoin enforcement of portions of

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[12]*Ragsdale v. Turnock*, 625 F.Supp 1212 (N.D.Ill. 1985) is reproduced in 88-790 Appendix G. The December 11, 1985 judgment order is not reported but is reproduced in 88-790 Appendix F.

[13]*Ragsdale v. Turnock*, 841 F.2d 1358 (7th Cir. 1988), is reproduced in 88-790 Appendix A. Its March 10, 1988 judgment order and the April 13, 1988 order amending the March 10, 1988 slip opinion are reproduced in 88-790 Appendix B and Appendix C, respectively.

[14]The August 12, 1988 order and the August 16, 1988 amended order denying both the Petition for Rehearing and the Suggestion for Rehearing En Banc are reproduced in 88-790 Appendix E and Appendix D, respectively.

[15]The Notice of Appeal is reproduced in 88-790 Appendix H.

[16]*Turnock v. Ragsdale*, 109 S.Ct. 3239, 106 L.Ed. 587 (1989).

[17]*Turnock v. Ragsdale*, 110 S.Ct. 532, 107 L.Ed. 530 (1989).

[18]*Turnock v. Ragsdale*, 59 U.S.L.W. 3013 (July 17, 1990), and *Turnock v. Ragsdale*, 60 U.S.L.W. 3013 (July 16, 1991). As noted in Footnote 3, *Turnock v. Ragsdale* (88-790) is the oldest Appellate Docket case carried over to the Court's 1991-92 term.

the Acts and the rules promulgated thereunder for abortions and abortion-related procedures performed from conception to birth. Limited Procedure Specialty Centers (Pregnancy Termination Specialty Centers) would be created with their own separate standard of medical regulation. Many abortion sites would be excluded completely from all medical regulations and licensing requirements of the State of Illinois. A February 13, 1990 deadline was set by the District Court for interested parties to file their written objections to the settlement proposal.

On February 13, 1990 Petitioners Murphy and Greenwood filed their written objections and Petitioners Reed and Aughenbaugh filed their petition to intervene. At the fairness hearing on February 23, 1990 Petitioners Murphy, Greenwood, Reed and Aughenbaugh personally appeared and through counsel presented oral objections to the settlement proposal.

The order denying intervention by proposed intervenors Reed and Aughenbaugh was entered on March 5, 1990.[19] On March 15, 1990 a Petition to Reconsider was filed. The order of March 22, 1990, which approved the settlement proposal, denied the Petition to Reconsider the Petition to Intervene.[20] On March 30, 1990 Petitioners Murphy and Greenwood filed a Rule 52(b) Petition which was granted in part by the April 19, 1990 order of the District Court, thus necessitating the filing of new Notices of Appeal.[21]

With jurisdiction based on 28 U.S.C. Section 1291, on April 20, 1990 Petitioners Murphy and Greenwood and Peti-

[19]The March 5, 1990 order denying intervention is reproduced in Appendix at A-67.

[20]The March 22, 1990 judgment order and the March 22, 1990 order which approved the settlement proposal and denied the Petition to Intervene are reproduced in Appendix at A-66 and A-36, respectively.

[21]The April 19, 1990 order which granted the Rule 52(b) Petition in part is reproduced in Appendix at A-68.

titioners Reed and Aughenbaugh filed separate Notices of Appeal.[22] The appeal of Petitioners, Reed and Aughenbaugh included the March 5, 1990 order.

On April 23, 1990 the order of April 19, 1990 granting the Rule 52(a) Petition was docketed. With jurisdiction still based on 28 U.S.C. Section 1291, on May 18, 1990, Petitioners Murphy and Greenwood and Petitioners Reed and Aughenbaugh again filed separate Notices of Appeal which included the April 19, 1990 order.[23] The appeal of Petitioners Reed and Aughenbaugh still included the March 5, 1990 order.

On July 9, 1990 the District Court refused to supplement the record with the over 1200 telegrams, models, letters and other papers it considered in approving the settlement proposal.[24]

The Court of Appeals consolidated the first two appeals on May 21, 1990 and consolidated all four appeals on June 7, 1990.[25] The Suggestion for Hearing En Banc on August 20, 1990 was denied by order corrected on August 22, 1990.[26]

With jurisdiction based on 28 U.S.C. Sections 1254(1) and 2101(e) a Petition for Certiorari before judgment was made to the Court. On December 3, 1990 the Court denied the Peti-

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[22]The Notice of Appeal of Murphy and Greenwood and the Notice of Appeal of Reed and Aughenbaugh are reporduced in Appendix at A-70 and A-69, respectively.

[23]The Notice of Appeal of Murphy and Greenwood and the Notice of Appeal of Reed and Aughenbaugh are reproduced in Appendix at A-72 and A-71, respectively.

[24]The July 9, 1990 order is reproduced in Appendix at A-77.

[25]The May 21, 1990 order and the June 7, 1990 order are reproduced in Appendix at A-73 and A-75, respectively.

[26]The August 20, 1990 corrected on August 22, 1990 is reproduced in Appendix at A-78.

tion and the case proceeded to oral argument before the Court of Appeals.

With jurisdiction based on 28 U.S.C. Section 1291 the Court of Appeals with another strong and vigorous dissent affirmed the District Court's denial of intervention and dismissed the appeal as to both the plaintiff class members, Murphy and Greenwood, and the proposed intervenors, Reed and Aughenbaugh.[28]

With jurisdiction based on 28 U.S.C. Section 1254(1) and 28 U.S.C. 2101(c) this Petition for Certiorari is being made to the Supreme Court of the United States.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

Federal Constitutional Provisions

United States Constitution, Amendment V (in relevant part):

No person shall...be deprived of life, liberty, or property, without due process of law.

United States Constitution, Amendment IX:

The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.

United States Constitution, Amendment X:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

[28] *Ragsdale v. Turnock*, 941 F.2d 501 (7th Cir. 1991)

United States Constitution, Amendment XIV (in relevant part):

No State shall...deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

State Constitutional Provisions

Illinois Constitution of 1970, Article I, Section 1:

All men are by nature free and independent and have certain inherent and inalienable rights among which are life, liberty and the pursuit of happiness. To secure these rights and the protection of property, governments are instituted among men, deriving their just powers from the consent of the governed.

Illinois Constitution of 1970, Article I, Section 2:

No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws.

Illinois Constitution of 1970, Article I, Section 12:

Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation. He shall obtain judgment by law, freely, completely, and promptly.

Illinois Constitution of 1970, Article I, Section 23:

A frequent recurrence to the fundamental principles of civil government is necessary to preserve the blessings of liberty. These blessings cannot endure unless the people recognize their corresponding individual obligations and responsibilities.

Illinois Constitution of 1970, Article I, Section 24:

The enumeration in this Constitution of certain rights shall not be construed to deny or disparage others retained by the individual citizens of the State.

Illinois constitution of 1970, Article II, Section 1:

The legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another.

Illinois Constitution of 1970, Article IV, Section 1:

The legislative power is vested in a General Assembly consisting of a Senate and a House of Representatives, elected by the electors from 50 Legislative Districts and 118 Representative Districts.

Illinois Constitution of 1970, Article V, Section 15:

The Attorney General shall be the legal officer of the State, and shall have the duties and powers that may be prescribed by law.

State Statutes

Abortion Act

Ill.Rev.Stat., Ch. 38, Sec. 81-21:

(Section 1 of the Abortion Act)

It is the intention of the General Assembly of the State of Illinois to reasonably regulate abortion in conformance with the decisions of the United States Supreme Court of January 22, 1973. Without in any way restricting the right of privacy of a woman or the right of a woman to an abortion under those decisions, the General Assembly of the State of Illinois do solemnly declare and find in reaffirmation of the longstanding policy of this State, that the unborn child is a human being from the time of conception and is, therefore, a legal person for purposes of the unborn child's right to life and is entitled to the right to life from conception under the laws and Constitution of this State. Further, the General Assembly finds and declares that longstanding policy of this State to protect the right to life of the unborn child from conception by prohibiting abortion unless necessary to preserve the life of the mother is impermissible only because of the decisions of the United States Su-

preme Court and that, therefore, if those decisions of the United States Supreme Court are ever reversed or modified or the United States Constitution is amended to allow protection of the unborn then the former policy of this State to prohibit abortions unless necessary for the preservation of the mother's life shall be reinstated.

It is the further intention of the General Assembly to assure and protect the woman's health and the integrity of the woman's decision whether or not to continue to bear a child, to protect the valid and compelling state interest in the infant and unborn child, to assure the integrity or marital and familial relations and the rights and interests of persons who participate in such relations, and to gather data for establishing criteria for medical decisions. The General Assembly finds as fact, upon hearings and public disclosures, that these rights and interests are not secure in the economic and social context in which abortion is presently performed.

Ill.Rev.Stat., Ch. 38, Sec. 81-30.1:
(Section 10.1 of the Abortion Act)

Any physician who diagnoses a woman as having complications resulting from an abortion shall report, within a reasonable period of time, the diagnosis and a summary of her physical symptoms to the Illinois Department of Public Health in accordance with procedures and upon forms required by such Department. The Department of Public Health shall define the complications required to be reported by rule. The complications defined by rule shall be those which, according to contemporary medical standards, are manifested by symptoms with severity equal to or greater than hemorrhaging requiring transfusion, infection, incomplete abortion, or punctured organs. If the physician making the diagnosis of a complication knows the name or location of the facility where the abortion was performed, he shall report such information to the Department of Public Health.

Any physician who intentionally violates this Section shall be subject to revocation of his license pursuant to para-

graph (22) of Section 22 of the Medical Practice Act of 1987.

Ill.Rev.Stat., Ch. 38, Sec. 81-31.1(a) & (b):
Section 11.1 of the Abortion Act)

(a) The payment or receipt of a referral fee in connection with the performance of an abortion is a Class 4 Felony.

(b) For purposes of this Section, "referral fee" means the transfer of anything of value between a doctor who performs an abortion or an operator or employee of a clinic at which an abortion is performed and the person who advised the woman receiving the abortion to use the services of that doctor or clinic.

Ambulatory Surgical Treatment Center Act
Ill.Rev.Stat., Ch. 111 1/2, Sec. 157-8.1 et seq.
(Reproduced in 88-790 Appendix I)

Health Facilities Planning Act
Ill.Rev.Stat., Ch. 111 1/2, Sec. 1151 et seq.
(Reproduced in 88-790 Appendix J)

Medical Practice Act
Ill.Rev.Stat., Ch. 111, Sec. 4400-22
(Reproduced in 88-790 Appendix K)

State Regulations

Ambulatory Surgical Treatment Center Licensing Requirements
77 Ill.Adm.Code, Ch. 1, Sec. 205, Subch. b
(Reproduced in 88-790 Appendix L)

August 15, 1990 Amendments to Ambulatory Surgical Treatment Center Licensing Requirements
77 Ill.Adm.Code, Ch. 1, Sec. 205
(Reproduced in Appendix M)

STATEMENT OF THE CASE

On December 1, 1990 by joint motion *Turnock v. Ragsdale* (88-790) was deferred on the eve of oral arguments[29] without the terms of the settlement proposal being disclosed to the Supreme Court. Negotiations had produced a proposed consent decree which would reject, by permanent injunction, portions of the Ambulatory Surgical Treatment Center Act, the Health Facilities Planning Act and the Medical Practice Act, for all three trimesters of pregnancy.

The original preliminary injunction of the District Court in 1985, affirmed by the Court of Appeals in 1988, had limited the injunction of the Acts to the first and/or early second trimester of pregnancy. Neither the District Court in 1985 nor the Court of Appeals in 1988 had found the Acts unconstitutional for the law second and/or third trimesters of pregnancy. And the district Court in 1990 did not make any new finding of unconstitutionality as to any provisions of the Acts prior to or upon approving the settlement proposal.

The express statutory scheme duly enacted by the Illinois General Assembly has been permanently enjoined and rejected by the consent of members of the executive branch, administrative agencies and private citizens and by the orders of the District Court. No constitutional authority is cited by either the parties or the District Court for this rejection.

Moreover, at the fairness hearing certain allegations were made to suggest that the Illinois Attorney General had shattered any expectation that he would vigorously defend the state statutes. In contemporary news accounts both critics and supporters of the settlement proposal speculated that the Attorney General had been eager to resolve the case because it

[29] *Turnock v. Ragsdale*, 110 S.Ct. 532, 107 L.Ed.2d 530 (1989).

had become politically disadvantageous to him to allow the Supreme Court to decide the case. The District Court did not review the settlement proposal with the heightened level of scrutiny appropriate to these circumstances. The record and the opinion of the District Court so demonstrate.

The original statutory scheme of the Illinois General Assembly provided that all abortions in Illinois were to be performed in either ambulatory surgical treatment centers or hospitals. Under the settlement proposal any geographical location within the borders of Illinois can be an abortion site so long as it is not primarily used for surgical procedures. And these sites would be totally excluded from all state licensing requirements. All abortions performed at these sites would be outside of all state medical regulation.[30]

In addition, the settlement proposal refers to abortion clinics as Limited Procedure Specialty Centers (Pregnancy Termination Specialty Centers) and allows them to operate with their own separate--and less restrictive--standard of state medical regulation.[31] For example, abortionists scrubbing for surgery and janitors cleaning toilet scrub brushes can use the same sink. No statute duly enacted by the Illinois General Assembly authorized the creation of these centers. Ironically, before being enjoined and then rewritten, this same section, Section 205.710, stated simply that all abortions "shall be provided to the public with the same standards of safety, effectiveness, and regard for patients rights as any other health service."

The consent decree also establishes a judicial double standard approved by the federal judiciary. First, as noted,

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[30]Ill.Rev.Stat., Ch. 111 1/2, Sec. 157-8.3 is enjoined. See *Ragsdale v. Turnock*, 734 F.Supp. 1457, 1460 (N.D.Ill. 1990) at note 7.

[31]77 Ill.Adm.Code, Ch. 1, Sec. 205, Subpt. G, Sec. 205.710 is reproduced in Appendix at A-95 to A-100. See *Ragsdale v. Turnock*, 734 F.Supp. 1457, 1460 (N.D.Ill. 1990).

some abortions sites are excluded from all state medical regulation and licensing requirements. Other sites are not excluded. The Ambulatory Surgical Treatment Center Act makes no such distinction. Second, portions of the Health Facilities Planning Act will not be enforced against Limited Procedure Specialty Centers (Pregnancy Termination Specialty Centers) but will be enforced against other surgical centers. The Health Facilities Planning Act makes no such distinction.[32] No statutory authority is cited by either the parties or the District Court to legalize this discriminatory enforcement.

The settlement proposal also effectively enjoins in part the enforcement of certain portions of the Abortion Act which were never pled in these proceedings, and the constitutionality of which was never challenged in these proceedings.

First, Section 10.1 requires a physician to report abortion complications to the Illinois Department of Public Health.[33] But the consent decree would enjoin the reporting of abortion complications by physicians at ambulatory surgical treatment centers.[34]

Second, Section 11.1 makes the payment or receipt of a referral fee in connection with the performance of an abortion a criminal offense.[35] But the consent decree would enjoin the referral fee prohibition for abortion counselors[36]

Petitioners Murphy and Greenwood are experienced emergency room nurses who have personally witnessed the medical and psychological complications, including suicidal

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[32]*Ragsdale v. Turnock*, 734 F.Supp. 1457, 1466-69 (N.D.Ill. 1990).

[33]Ill.Rev.Stat., Ch. 38, Sec. 81-30.1

[34]77 Ill.Adm.Code, Ch. 1, Sec. 205, Subpart G., Sec. 205.760-Reports, in 88-790 Appendix at App. 223.

[35]Ill.Rev.Stat., Ch. 38, Sec. 81-31.1.

[36]77 Ill.Adm.Code, Ch. 1, Sec. 205, Subpart G., Sec. 205.730(b)-Counseling, in 88-790 Appendix at page App. 221.

ideations, which can and do result from legal abortions. They are also members of the plaintiff class of Illinois women of child-bearing age who desire or may desire an abortion sometime in the future. Upon learning of the terms of the settlement proposal, these petitioners personally concluded that the health and medical care of women seeking abortions had been illegally, unconstitutionally, and dangerously compromised. They filed timely written objections, personally appeared at the fairness hearing, and through counsel voiced their oral objections to the proposed consent decree.

The settlement proposal also effectively enjoined enforcement of Section 1 of the Abortion Act which acknowledges unborn children as human beings and which establishes the state personhood of unborn children.[37] In fact at no time is the personhood of the unborn child in Illinois either acknowledged or considered by the District Court.

First, the consent decree allows abortion procedures to be performed outside of ambulatory surgical treatment centers and hospitals in sites least able to protect the life and liberty interests of an unborn child.[38]

Second, future regulations are restricted to health and safety concerns for the woman and by permanent injunction cannot include health and safety concerns for the unborn child.[39]

Third, Pregnancy Termination Specialty Centers, or PTSC's, can perform abortions on a woman with an unborn child of 18 weeks gestational age. In the future the District Court may allow an unborn child of higher gestational age to be destroyed at a PTSC based solely upon health and safety

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[37]Ill.Rev.Stat., Ch. 38, Sec. 81-21.

[38]*Ragsdale v. Turnock*, 734 F.Supp. 1457, 1466 (N.D.Ill. 1990).

[39]*Ragsdale v. Turnock*, 734 F.Supp. 1457, 1469 (N.D.Ill. 1990).

concerns for the mother. The health and safety of the unborn child by permanent injunction is not to be considered.[40]

Petitioners Reed and Aughenbaugh, as expectant fathers of unborn children, concluded that the consent decree illegally, unconstitutionally, and dangerously compromised the health, safety, life and liberty interests, and the very personhood of their unborn children. They filed their written objections through their Petition to Intervene, personally appeared at the fairness hearing, and through counsel voiced their oral objections to the proposed consent decree.

The District Court's March 22, 1990 order, approving the settlement proposal and entering the consent decree, acknowledged that the "consent decree introduces a new scheme" and recognized that "the settlement creates a network of statutes and rules regulating the provisions of abortion services."[41] The new rules and medical regulations integral to this newly created organic statutory scheme were formally adopted on August 15, 1990.[42]

The District Court's March 22, 1990 order is silent as to the Illinois Constitutional provisions which provide for a clear separation of power between the executive and legislative branch and which vest all legislative authority in the Illinois General Assembly. The order is also silent as to other Illinois Constitutional provisions which allow the unborn child to protect her rights and which mandate the courts to allow her to do so.

Petitioners Murphy and Greenwood and Petitioners Reed and Aughenbaugh filed separate appeals which were

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[40]*Ragsdale v. Turnock*, 734 F.Supp. 1457, 1470 (N.D.Ill. 1990).

[41]*Ragsdale v. Turnock*, 734 F.Supp. 1457, 1460-61 (N.D.Ill. 1990).

[42]The new regulations formally adopted on August 15, 1990 are reproduced in Appendix at A-80 et seq.

consolidated pursuant to the order of the Court of Appeals.[43] Petitioners Reed and Aughenbaugh also included in their appeal the denial of their Petition to Intervene.[44]

Petitioners Murphy and Greenwood and Petitioners Reed and Aughenbaugh then filed a Petition For Certiorari Before Judgment. At that time the case had been in various levels of the federal judiciary for five years. Moreover, the Petitioners felt that the case presented questions of imperative public importance. And the Court had previously recognized the exceptional importance of *Turnock v. Ragsdale* (88-790).[45]

On December 3, 1990 the Court denied the Petition For Certiorari Before Judgment.[46] On December 4, 1990 the Court of Appeals heard oral arguments and on August 20, 1991 rendered its ruling.[47] The Court of Appeals with a strong and vigorous dissent ruled in a plurality opinion that the District Court was to be affirmed. Judge Posner and Judge Flaum both agreed that the settlement proposal was of questionable legality. However, since Judge Posner ruled that no one had standing to appeal, the constitutionality of the illegal settlement could not be effectively challenged.

Petitioners Murphy and Greenwood and Petitioners Reed and Aughenbaugh now Petition this Court for the relief they have been denied to date. They have filed their present Petition for Certiorari. They realize that this Court has already found *Turnock v. Ragsdale* (88-790) to be of exceptional importance. They pray that this Court will still find it so.

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[43]The May 21, 1990 and June 7, 1990 orders of consolidation are reproduced in Appendix at A-73 and A-75, respectively.

[44]The April 20, 1990 and May 18, 1990 Notices of Appeal of Petitioners Reed and Aughenbaugh are reproduced in Appendix at A-69 and A-71, respectively.

[45]*Turnock v. Ragsdale*, 109 S.Ct. 3239, 106 L.Ed.2d 587 (1989).

[46]*Murphy v. Ragsdale*, 111 S.Ct. 568, 112 L.Ed.2d 574 (1990).

[47]*Ragsdale v. Turnock*, 941 F.2d 501 (7th Cir. 1991).

SUMMARY OF ARGUMENT
Murphy v. Ragsdale
Is Of Exceptional Importance

The Illinois General Assembly enacted statutes to assure the safety of medical care, to safeguard the health of the public, and to contain the rising costs of medical care. Abortion and abortion-related medical services were only one of the health care services to be regulated. At that time both pro-choice and pro-life advocates and legislators supported regulation of the abortion industry. In Illinois women were suffering preventable and unnecessary injuries at the hands of abortionists. Some women even died. It was a disgrace--covered extensively by the print media.

In 1985 the District Court enjoined the enforcement of essentially the entire regulatory scheme for the first and early second trimester of pregnancy. The ruling, affirmed by the Court of Appeals, was based upon the limitations *Roe v. Wade* imposed upon legislative enactments.

In a vigorous dissent Judge Coffey pointed to the stated legislative intent and the extensive legislative history which surround the enactments.

Ironically, the main argument against the statutory scheme was cost even though Dr. Ragsdale himself testified to de minimus cost increases and other testimony disclosed that by raising the standard of medical care found in the abortion industry to the medical standard of other out-patient surgeries, abortions which previously had been performed in hospitals could safely be performed in Ambulatory Surgical Treatment Centers at a substantial cost savings to the patient.

When the Court agreed to hear *Turnock v. Ragsdale,* many thought that the Court would give the State some lati-

tude in their legislative enactments. Medical care could be effectively regulated to assure health and safety. Then the case was deferred for settlement. A properly negotiated settlement within constitutional guidelines could have been helpful even then. But as Judge Posner noted, the statutes were gutted and precious little was left. Political expediency triumphed over the health and safety of women.

On its face the settlement is an insult to women. To think that janitors cleaning toilets and doctors scrubbing for surgery use the same sinks is plain filth. No respectable animal rights group would allow a veterinarian to do the same.

The Court of Appeals saw the problem. Judge Posner and Judge Flaum both saw the illegality and the political impropriety. But the Court of Appeals denied standing by redefining the legislative intent of years of legislative enactments which regulated a whole host of out-patient surgeries and other medical treatments. A majority concluded that the entire statutory scheme was designed exclusively by the Illinois General Assembly to make abortions more expensive.

In the five year judicial history of the *Ragsdale* case State sovereignty has been compromised, legislative intent and history have been passed over, and the health of women is still at risk. The whole process is reminiscent of the Vietnam era cartoon with a general over a village which is utterly destroyed. He states quite simply, "We had to destroy it to save it." Just how many women are going to have to suffer before its becomes obvious to all that they too are the victims.

We are not attempting to enforce the law. We are not prosecutors. Both Petitioners Murphy and Greenwood and Petitioners Reed and Aughenbaugh are merely appealing a settlement which illegally and unconstitutionally rewrites statutes which were enacted to safeguard our respective interests. Thus, we submit our Petition for Certiorari to the Court.

ARGUMENT ONE:
Petitioners Murphy and Greenwood Have Standing To Appeal

The Court of Appeals correctly observed that two purported members of the plaintiff class objected to the consent decree and have appealed. Both Ritaellen M. Murphy, R.N., and Penny R. Greenwood, R.N., timely filed their written objections to the proposed agreement by the February 13, 1990 deadline set by the order of the District Court. On February 23, 1991 the District Court conducted a fairness hearing at which time the lawyer for the plaintiff class members Murphy and Greenwood was allowed to speak. After reviewing the record in the District Court, the Opinion of the Court of Appeals correctly concluded that: "All of the objections argued on appeal appear to have been raised."

The Court of Appeals correctly noted that Appellants Murphy and Greenwood objected to the medical health of Illinois women being compromised. And further objected that "when the constitutionality of a state statute is at issue, it is improper for a federal court to issue a consent decree against enforcement upon the consent of the Attorney General and other members of the executive department, and that defendants have, in effect, re-written the statutes."

A. The Court of Appeals denied standing by holding that the settlement was "too favorable"

The Court of Appeals erroneously held that Appellants Murphy and Greenwood had no standing to make any objections in their capacity as members of the plaintiff class since, in the opinion of the Court of Appeals, these "arguments are offered in support of the claim that the decree is too favorable to plaintiffs."

The key to the error of the Court of Appeals is found in

the words "too favorable" and in the Court of Appeals erroneous conclusion that all of the statutes at issue were adopted to make abortions more expensive.

The concurring opinion of Judge Posner agreed with the finding of Judge Fairchild that "the women's appeal from the consent decree must be dismissed because they lack standing to appeal even though they were parties in the district court."

B. To hold that the settlement was "too favorable" the Court of Appeals had to redefine legislative intent

The concurring opinion of Judge Posner amplified the Opinions of the Court by stating that the "consent decree guts a statute that was (to speak realistically) designed to limit the number of abortions performed in Illinois by making abortions more expensive."

C. By redefining legislative intent, no one can possibly be harmed by the settlement

Erroneous presumptions lead to erroneous conclusions. For example, since the statutes have been "gutted", any potential increase in abortion expense has been eliminated, and no harm remains to be litigated. Thus, the Appellants Murphy and Greenwood become merely ideological litigants. Since "an affront to one's ideology is not an interest that will support standing to sue," Appellants Murphy and Greenwood have no standing to appeal.

However, if the statutory scheme duly enacted by the Illinois General Assembly was not to make abortions more expensive, then this entire reasoning fails. Like so many blocks, if foundation blocks are removed the whole pile will coming tumbling down.

D. Legislative intent clearly encompassed health and safety and the control of medical costs

Judge Flaum's dissent does make mention of the legislative history of the Illinois statutory scheme. However, the true emphasis and clarity of his dissent is his analysis of the changes in abortion law, the impropriety of the behavior of the parties, and the inappropriateness of the settlement, both from the standpoint of what the court should have done and also what the parties should not have done.

The most thorough judicial discussion of legislative intent and legislative history on point can be found in Judge Coffey's excellent dissent in *Ragsdale v. Turnock*, 841 F.2d 1358 (1988). In addition, several amicus filings in *Turnock v. Ragsdale* (88-790) are quite enlightening. The most informative is entitled: "Brief of Certain Illinois Senators and Representatives as Amici Curiae in Support of Appellants."

The members of the Illinois General Assembly who filed their Brief also had the foresight to file copies of the *Sun-Times* series, "The Abortion Profiteers." As the oldest pending file, the *Turnock v. Ragsdale* (88-790) briefs are located just inside the Clerk's file storage room in the first open cabinet to the right and take up the top few shelves. The *Sun-Times* articles are the only oversized filing in the amici section. The articles are 11 by 8 1/2. Ironically, Arnold Bickham, one of the abortion providers mentioned in the *Sun-Times* expose was just convicted of an abortion-related felony in Cook County, Illinois, on November 4, 1991. The *Sun-Times* had the story once again. *Chicago Sun-Times*, November 5, 1991 at page 10, columns 4 and 5.

Since the evidence is overwhelming that the statutes were adopted for health and safety and to control medical expense, then the "gutting" of the statutes is a harm. Appellants Murphy and Greenwood do have standing. And the illegality

of a consent decree which in Judge Posner's words "preserves very little of the statute" can be addressed on appeal.

E. Majority of the Court of Appeals concluded that the settlement was illegal

Ironically, a majority of the Court of Appeals did hold that the proposed settlement was illegal. As Judge Posner stated, "Judge Flaum is rightly concerned with the district court's failure to probe the adequacy of the settlement embodied in the consent decree that the court approved." And Judge Flaum concluded his dissent by stating that: "In this case, the district court was faced with a changing body of law concerning permissible regulation of abortion and a state officer whose motivations in settling this case were questioned at the fairness hearing and elsewhere. These circumstances demanded a more searching examination of the fairness of the consent decree the parties arrived at than the district court provided. I respectfully dissent."

But although Judge Posner recognized the illegality he did not join with Judge Flaum in forming a majority. For Judge Posner believed that there was "no one before us who is entitled to challenge the consent decree." When Judge Fairchild and Judge Posner redefined the legislative motives and purposes of the statutes as clearly expressed by the Illinois General Assembly, they changed the outcome of the suit and enabled the District Court to approve an illegal settlement.

If the majority's view of standing is to be adopted, the plaintiff class of women of child-bearing age who desire or may desire an abortion sometime in the future received notice of the fairness hearing as a matter of form over substance. For what fairness occurs when an illegal settlement cannot be appealed from by members of a class which is a party to the litigation?

ARGUMENT TWO:
The District Court Lacked Subject Matter Jurisdiction To Enter A Consent Decree Outside Of Its Inherent Power

A. The Illinois General Assembly is the exclusive legislative body in the State of Illinois

Illinois has long recognized a separate and distinct separation of powers between the legislative, executive and judicial branches.[48] The legislative power is vested exclusively in the General Assembly. Only the General Assembly can constitutionally enact statutes.[49] On common-law principles, as well as settled constitutional law, this legislative power cannot be delegated to another body, authority or person.[50] Only the Illinois General Assembly can legislate.

1. The Illinois Attorney General cannot legislate in the State of Illinois

The Illinois Attorney General, as the legal officer of the State of Illinois, is a member of the executive branch and is constitutionally prohibited from exercising the powers of the legislative branch.[51] Thus, the representations of the Attorney General are not binding on the courts and legislature of the State of Illinois.[52] The Attorney General cannot reject legislation, or hold particular statutes to be unconstitutional, or otherwise be the binding determinator of duly enacted statutes.[53] The Illinois Attorney General simply cannot legislate for the Illinois General Assembly.

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[48]Illinois Constitution of 1970, Article II, Section 1.
[49]Illinois Constitution of 1970, Article IV, Section 1.
[50]*People v. Tibbitts*, 56 Ill.2d 56, 305 N.E.2d 152, 155 (1973).
[51]Illinois Constitution of 1970, Article II, Section, and Article V, Section 15.
[52]*Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658, 99 S.Ct. 3055, 61 L.Ed.2d 823 (1979).
[53]*National Revenue Corporation v. Violet*, 807 F.2d 285, 288 (1st Cir. 1986).

2. No State's Attorney, including the Cook County State's Attorney, can legislate in the State of Illinois

The Cook County State's Attorney is a member of the county executive branch with the Cook County Board serving as the county legislative branch. Any state's attorney, including the Cook County State's Attorney, is not authorized to act for the county board. If he does, his actions will be judicially held to be void ab initio.[54] The judicial designation of the Cook County State's Attorney as class representative for all Illinois State's Attorneys does not create constitutionally recognized legislative authority. If the Cook County State's Attorney cannot legislate for the Cook County Board, he certainly cannot legislate for the Illinois General Assembly.

3. Illinois administrative agencies cannot legislate in the State of Illinois

The Department of Public Health, the Department of Professional Regulation, and the Ambulatory Surgical Treatment Center Board are all Illinois administrative agencies. These agencies have no greater powers than those conferred upon them by the legislation creating them.[55]

The Illinois General Assembly in delegating to these agencies the performance of certain functions may not invest them with arbitrary powers and cannot constitutionally delegate to administrative agencies the power to legislate.[56] Moreover, Illinois administrative agencies have no authority to adopt administrative regulations inconsistent with the express statu-

[54] *Will County v. Georg*, 103 Ill.App.3d 1016, 59 Ill.Dec. 264, 431 N.E.2d 765 (1982).

[55] *Village of Lombard v. Pollution Control Board*, 66 Ill.2d 503, 6 Ill.Dec. 867, 363 N.E.2d 814, 815 (1977).

[56] *People v. Tibbitts*, 56 Ill.2d 56, 305 N.E.2d 152, 155 (1973).

tory enactments of the Illinois General Assembly. Quite clearly, no Illinois administrative agency can legislate for the Illinois General Assembly.

B. The District Court exceed the limits of its judicial authority in approving the settlement proposal

The wisdom or the lack of wisdom of a regulatory enactment is for the Illinois General Assembly to determine, and whether it is the best means to achieve the desired results, and whether the legislative discretion within its prescribed limits should be exercised in a particular manner are matters for the judgment of the Illinois General Assembly. The honest conflict of serious opinion does not suffice to bring these matters within the range of judicial cognizance.[57] Such is the mistake of the District Court in the instant case.

1. The District Court failed to ascertain that the parties lacked the authority to consent to the proposed settlement

A consent decree's force comes from agreement rather than positive law. The validity of the consent decree depends upon the parties' authority to give assent. The District Court in the instant case should not have allowed itself to be deceived by consenting parties who acted as though they had authority when they have none. That the parties would so deceive the District Court is reprehensible.

All District Courts must be on the lookout for any such attempts to use consent decrees to make end runs around the Illinois General Assembly, for the sovereign legislative power

[57] *Chicago Allis Mfg. Corp. v. Metropolitan Sanitary District of Greater Chicago*, 52 Ill.2d 320, 288 N.E.2d 436, 441 (1972).

constitutionally vested in the Illinois General Assembly is consistent with the federal Constitution which does not require a specific separation or allocation of powers within any state government. Thus, debate as to the wisdom of the allocation of powers within any state government is foreclosed to the federal judiciary.[58]

a. The Illinois Attorney General and the Cook County State's Attorney both acted without authority

The District Court should have discovered the lack of authority of both the Illinois Attorney General and the Cook County State's Attorney. Some rules of law are designed to limit the authority of public officeholders, to make them return to other branches of government to engage in certain acts. They may chafe at these restraints and seek to evade them. If they do, the officeholders have acted without authority, as they have done here.[59]

b. All of the Illinois administrative agencies acted without authority

The District Court should have discovered the lack of authority of the Department of Public Health, the Department of Professional Regulation, and the Ambulatory Surgical Treatment Center Board. A consent decree is not a method by which state agencies may liberate themselves from the statutes enacted by the legislature that created them, as they attempted here.[60]

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[58] *Coniston Corporation v. Village of Hoffman Estates*, 844 F.2d 461, 469 (7th Cir. 1988).

[59] *Dunn v. Carey*, 808 F.2d 555, 560 (7th Cir. 1986).

[60] *Kasper v. Board of Election Commissioners of the City of Chicago*, 814 F.2d 332, 341-42 (7th Cir. 1987)

A District Court should not stray from its judicial province and enter an order which permits administrative agencies to engraft their own notions outside of express statutory authority. Yet, this is exactly what the District Court did in the instant case.[61]

c. All of the private citizens who negotiated the settlement acted without authority

The District Court should have recognized that the private citizens, such as Dr. Ragsdale, simply have no authority at all. If they did, then other citizens with other beliefs or causes would have the authority too. Pornographers could join with the Illinois Attorney General and rewrite obscenity statutes. Polluters could join with the Illinois Attorney General and rewrite environmental statutes. Private citizens do not legislate for the State of Illinois. The Illinois General Assembly does.

ARGUMENT THREE:
The Denial of Intervention was Prejudicial To the Rights of the Unborn Children

When Dr. Ragsdale filed his suit in 1985 the focus of his case was the constitutional validity of certain Illinois statutes and regulations as they related to women who might chose to abort their children. Unborn children were not potential parties, nor could they have been for unborn children had no right to life under Illinois law. As the proceedings went from the District Court to the Appellate Court and finally to the Supreme Court unborn children were still not proper parties.

[61] *Vermont Yankee Nuclear Power Corp v. National Defense Council, Inc.*, 435 U.S. 519, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978).

Then in the summer of 1989 the Court rendered its decision in *Webster v. Reproductive Health Services.* For the first time since the Court rendered its decision in *Roe v. Wade,* unborn children became persons with the right to life under Illinois law. This occurred since Section 1 of the Illinois Abortion Act provides that unborn children are persons, and that once the Court's decisions in *Roe v. Wade* and *Doe v. Bolton* are ever modified or reversed, then the former policy of the State of Illinois "to prohibit abortions unless necessary for the preservation of the mother's life shall be reinstated."

And the Illinois Constitution of 1970, Article I, Section 12, provides a remedy to every person for injuries and wrongs which he receives to his person. The unborn children should be allowed to intervene to be provided that remedy.

Judge Posner acknowledged the personhood of Illinois unborn children for purposes of intervention. And certainly, since the statutes had been gutted and the Illinois Attorney General had abandoned the interests of the unborn children, the argument for intervention was strong. However, Judge Posner concluded that the unborn children could not be allowed to intervene for they were attempting to enforce the statutes.

This is simply not the case. Even if all of the statutes at issue were enacted exclusively for the benefit of the unborn children, they cannot assume enforcement responsibilities. Private citizens have no such authority. Only the executive branch of the State of Illinois has such authority.

However, the unborn children can intervene to stop the parties from illegally and unconstitutionally compromising the rights which unborn children now do have under Illinois law. It is the illegal actions of the parties that give rise to the basis for the right to intervene.

CONCLUSION

For all of the foregoing reasons, this Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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